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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

VS.

LARRY PLUNKETT,
Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Statement of Case.....2

Reason for Denying Petition No. 1.....6

Reason for Denying Petition No. 2.....8

Reason for Denying Petition No. 3.....9

Conclusion.....11

Appendix A.....A-1

TABLE OF AUTHORITIES

CASES:

Cupp v. Naughton,
414 U.S. 141 (1973).....6,9

Engle v. Isaac,
456 U.S. 107 (1982).....6

Jackson v. State,
591 SW2d 820.....4

Plunkett v. State,
591 SW2d 907.....A-3

Sandstrom v. Montana,
442 U.S. 510 (1979).....6,9

Wainwright v. Sykes,
433 U.S. 72 (1977).....6

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Respondent respectfully prays this Honorable Court to deny the requested writ of certiorari and to order the mandate to issue immediately.

STATEMENT OF THE CASE

Larry Plunkett, Respondent in this case, was convicted by a Palo Pinto jury of the offense of murder and sentenced to fifty (50) years confinement in the Texas Department of Corrections. Respondent was indicted for the offense of intentionally and knowingly causing the death of April Dawn Peters by striking her with his hands. (Tr. 3, indictment is set out in Appendix F of Petitioner's petition) The indictment clearly charged Respondent with murder as defined in §19.02 (a)(1) of the Texas Penal Code. The jury charge presented to the jury, however, defined both theories of murder, tracked the indictment in the application of the law to the facts of the case, and then instructed the jury in paragraph 3A that in order to find Respondent guilty of the

alleged murder, they must find that Respondent intentionally or knowingly caused the death of the deceased. Paragraph 3A then went on to charge "He must have intentionally or knowingly caused the death, or he must have intended to cause serious bodily injury and have committed an act clearly dangerous to human life that caused the death of deceased." There was only a general objection to the charge that the State should elect.

On original submission, a panel of the Texas Court of Criminal Appeals considering the jury charge as a whole and in the context of the trial itself found fundamental error in the jury charge in that it authorized the jury to convict Respondent of an offense not alleged in the indictment. (See D-1 through D-4 of Petitioner's petition) On its own Motion for

Rehearing, the Texas Court of Criminal Appeals affirmed the conviction holding that to determine if the jury was authorized to convict for an offense not alleged in the indictment the paragraph applying the law to the facts of the case would be singled out and judged in isolation from the charge as a whole and the trial itself. (D4 through D21 of Petitioner's petition) This is the first case in Texas jurisprudence to hold that error in a jury charge will be determined by looking at a single paragraph in isolation from the rest of the charge and trial. In all other types of cases, the Texas Court of Criminal Appeals has held that to determine error in a jury charge, the court must look to the charge as a whole. (see dissenting opinion of Judge Truman Roberts in Jackson v. State, 591 SW2d 820,

reproduced in Appendix A herein) When the Texas Court of Criminal Appeals applied the correct standard of review--considering the charge as a whole in the context of the trial--the Texas Court of Criminal Appeals came to the same conclusion as the Fifth Circuit Court of Appeals.

After the Texas Court of Criminal Appeals turned down Respondent's Motion for Rehearing, Respondent filed his petition for writ of habeas corpus with the United States District Court for the Northern District of Texas, Fort Worth Division. Respondent's petition was denied by the District Court for the Northern District of Texas, Fort Worth Division on December 14, 1981.

Respondent then appealed the District Court's decision to the United States

Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed and remanded the cause "with instruction that the district court set a reasonable time within which Texas may try Plunkett again."

The State then petitioned this Honorable Court for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

1. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DID NOT VIOLATE THE DEFAULT DOCTRINE OF WAINWRIGHT V. SYKES, 433 U. S. 72 (1977) and ENGLE V. ISAAC, 456 U.S. 107 (1982) IN CONSIDERING THE JURY CHARGE IN THE CONTEXT OF THE ENTIRE TRIAL.

This Honorable Court has consistently held that to determine error in a jury trial, the error must be considered in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141 (1973); Sandstrom v. Montana, 442 U.S. 510 (1979) If the charge is to be view as a whole in

the context of the trial itself, then the charge must be considered in the context of the trial as a whole including all the words spoken and all the documents or instructions within the trial, objectionable or not. To take the Petitioner's argument to its logical conclusion, only those portions of the charge and trial which were objected to by the defense could be considered by the Court in determining error. Since most of a trial is not objectionable, this theory of review would effectively prevent the Court from considering the charge as a whole in the context of the entire trial. The Texas Court of Criminal Appeals refused to consider the prosecutor's argument as an independent ground of error because the defense failed to object to the argument. (D-15 through D-16 of Petitioner's

petition) The United States Court of Appeals for the Fifth Circuit honored that procedural default. (B-7 of Petitioner's petition) The majority of the United States Court of Appeals for the Fifth Circuit recognized that although the argument could not be considered as error in and of itself, the argument of necessity had to be considered in connection with determining error in the charge in order to place the jury charge in the context of the trial as a whole. To do otherwise would be to isolate the error in the charge from the trial itself.

Clearly the United States District Court was correct in considering the charge as a whole in the context of the full trial.

2. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROVIDED THE STATE COURT'S DETERMINATION A PRESUMPTION OF CORRECTNESS.

The United States Court of Appeals for the Fifth Circuit was very careful in pointing out that the difference in the rulings did not evolve "from a reading of the same record" but rather the difference was the standard of review used by the Texas Court of Criminal Appeals. (B-9 of Petitioner's petition) In fact, the Texas Court of Criminal Appeals reached the same result when they applied the standard of review mandated by this Honorable Court in Cupp v. Naughton, 414 U.S. 141 (1973) and Sandstrom v. Montana, 442 U.S. 510 (1979). (D-1 through D-4 of Petitioner's petition) The Court of Appeals opinion is correct and the petition for writ of certiorari should be denied.

3. THE QUESTION OF FEDERAL LAW PRESENTED BY THIS CASE DOES NOT INVOLVE AN ISSUE OF SUCH NATIONAL IMPORTANCE THAT IT REQUIRES THE VALUABLE TIME OF THIS HONORABLE COURT.

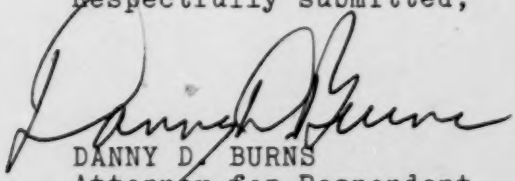
The true issue in this case is whether a state court can single out an individual instruction in isolation from the rest of the charge and trial in order to determine if a jury is authorized to convict a defendant on a theory not alleged in the indictment. I know of no other state that holds that individual jury instructions must be considered in isolation from the rest of the charge and trial to determine if error exists. In fact, Texas itself requires that all other errors in the jury charge must be considered in the context of the charge as a whole. (Appendix A and Texas Digest §822(1) which contains over 150 cases which hold that the charge must be considered as a whole) The ruling in this case would, therefore, seem to have little national impact and review by this

Honorable Court would have little national significance and accordingly the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons stated herein, Respondent respectfully prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit be in all things denied.

Respectfully submitted;



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APPENDIX A

Michael W. JACKSON, Appellant

V.

The STATE of Texas, Appellee.

NO. 57474

Court of Criminal Appeals of Texas,
Panel No. 2

May 16, 1979.

Rehearing Denied January 23, 1980.

591 SW2d 825

At p. 825:

ROBERTS, Judge, dissenting.

Like Janus, the Court today sets its face in opposite directions at once. In this case the Court holds that we must review the charge as a whole, not limiting our view to the part that applies the law to the facts. In Plunkett v. State, 591 SW2d 907 (Tex.Cr.App. No 55,078), also decided this date, the Court ignores errors in the charge as a whole, limiting its review to the part that applies the law to the facts. I can synthesize only one rule that reconciles these cases: In the face of plain error in a charge, the Court will adopt whichever approach leads to the result it desires.

I cannot understand why the Court takes comfort from reading the Jackson charge as a whole, for the more paragraphs one reads, the more errors he will will find. The crucial paragraph 5 omits the aggravation element. Not to worry, says the Court, for that element can be found in paragraphs 1 and 4. Of course, paragraph 4 itself contains an erroneous charge on "same criminal episode."[1] But these errors are somehow cured in the context of paragraph 6, which gets both the "same criminal episode" element and the aggravation element wrong.[2]

The Court's theory of juries, then, must be that they read all the paragraphs of the charge, picking a bit from this paragraph and a bit from that, to assemble the law. (Never mind that the Court assumes that the jury can distinguish right bits from wrong.) But if that is how a jury acts, then Plunkett must be wrongly decided, for it operates on a theory that juries read only one paragraph of a charge, ignoring the charge as a whole.

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1. The element of "same criminal episode" appears in V.T.C.A., Penal Code, Sec. 21.03(a)(1), not in Sec. 21.03(a)(2) which was involved in this case.

2. Paragraph 6 repeated the immaterial language about "same criminal episode" and failed to require a finding that the threat was of harm "to be imminently inflicted."

Plunkett is essentially the obverse of Jackson; it had a correct application of the law to the facts, but defective abstract instructions and a defective defensive charge. Plunkett was indicted for intentionally and knowingly causing a death; V.T.C.A., Penal Code, Section 19.02(a)(1). The definition of murder was erroneously expanded to include causing death by committing an act clearly dangerous to human life with the intent to cause serious bodily injury; V.T.C.A., Penal Code, Section 19.02(a)(2). The jury was instructed that a person could be found guilty on either theory. The error was compounded by the prosecutor's argument that the erroneous theory "applies in this case." The theory of defense was, no intent to murder. The error was plainly "calculated to injure the rights of defendant"; V.A.C.C.P., Article 36.19. Only by refusing to read the charge as a whole could the jury have remained free from this error. But we know from Jackson that juries read the charge as a whole.

The Court necessarily is holding that a jury of laymen will know when a charge has no correct paragraphs (as in Jackson) so that it can assemble a correct instruction piecemeal, and that it will know when a charge has only one correct paragraph (as in Plunkett) among several incorrect ones. And it will read the charge as a whole in the former case, and ignore the charge as a whole in the latter case. If a jury could do these things there would

be no need for charges on the law and we would not have to invent inconsistent reasons for affirming cases. But they cannot do the former and we should not do the latter. I dissent.